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Supreme Court, U.S.
FILED

061449 APR 3 - 2007

OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

CHARLES L. ABRAHAMS,
for the Estate of Pearl Abrahams,
Charles L. Abrahams, individually

Petitioners,

vs..

JACOB HEALTH CARE
CENTER, LLC; PREMIER
MANAGEMENT, INC.

Respondents.

On Petition for a Writ of Certiorari from the California Supreme Court

APPENDIX TO CORRECTED PETITION FOR A WRIT OF CERTIORARI

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Court of Appeal, Fourth Appellate District, Div. 1 – No. D046939
S147984

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CHARLES L. ABRAHAMS,
Individually and as Administrator, etc., Plaintiff and Appellant,

v.

JACOB HEALTH CARE CENTER, LLC, Defendant and Respondent

Petition for review DENIED.
The request for an order directing publication of the opinion is denied.

Corrigan, J., was absent and did not participate.

(Filed January 3, 2007)

GEORGE
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL,

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHARLES L. ABRAHAMS, Individually and as Administrator, etc.,	D046939
Plaintiff and Appellant,	(Super.Ct.No. GIC811639)
vs.	
JACOB HEALTH CARE CENTER, LL., et al.	(FILED OCTOBER 13, 2006)
Defendant and Respondent.	

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Vincent P. Di Figlia, Judges.

Affirmed.

Charles Abrahams, individually and as administrator of the Estate of Pearl Abrahams, appeals a judgment entered against him

by the trial court in his action against Jacob Health Care Center, LLC (JHCC). Abrahams sued JHCC for its alleged mistreatment of his mother, Pearl Abrahams, who was a resident at an assisted living center operated by JHCC. On appeal, Abrahams makes numerous challenges to the trial court's rulings in the proceedings below, arguing primarily that the trial court's sustaining of JHCC's demurrers, which resulted in the dismissal of most of his causes of action on statute of limitations grounds, as well as the trial judge's failure to recuse herself despite an asserted "appearance of partiality," constitutes error requiring reversal. We find no merit to Abrahams's contentions, and affirm the judgment.

I

PROCEDURAL HISTORY

On May 29,2003, Abrahams filed a complaint against JHCC and its parent company, Premier Management, Inc. (Premier Management) that alleged the following causes of action: (1) "Elder Abuse Act";[1] (2) "Constructive Fraud"; (3) "Conversion"; (4) "Breach of Contract and Rescission"; (5) "Deceit"; (6) "Intentional Infliction of Emotional Distress"; (7) "Battery"; (8)

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[1] Welfare and Institutions Code section 15600 et seq.

"Assault"; (9) "Lack of Informed Consent"; and (10) "Fraudulent Misrepresentation." JHCC filed both a demurrer to the complaint, and a motion to strike portions of the complaint.

After a hearing on October 10, Judge Vincent Di Figlia, sustained the demurrer and dismissed the motion to strike as moot. The court's ruling was reflected in a minute order of that same date (the October 10 order). The court sustained the demurrer without leave to amend with respect to five of the causes of action (elder abuse, intentional infliction of emotional distress, assault, battery, and lack of informed consent) because the face of the complaint demonstrated the causes of action were barred by the applicable statutes of limitation. The court sustained the demurrer to the "constructive fraud" cause of action without leave to amend because it found the facts pled were insufficient to state that claim, and that the theory was superfluous to other theories contained in the complaint. The court sustained the demurrer with respect to the conversion, breach of contract, deceit, and fraudulent misrepresentation causes of action, but granted Abrahams 14 days

within which he could amend the complaint to remedy identified failings in the allegations.[2]

On October 20, the case was reassigned to Judge Joan Lewis. Abrahams then filed a pleading entitled "Request for Clarification and Request for the Exercise of the Court's Inherent Authority to Modify or Revoke its Previous Orders When There is a Mistake of Law," in which he sought reconsideration of Judge Di Figlia's October 10 order. The court denied Abrahams's request on December 5, 2003, stating that after "review[ing] all the papers submitted," it concluded that the October 10 order did not require clarification or modification.

While Abrahams's request for clarification was pending, JHCC moved to dismiss Abrahams's action for failure to amend the complaint within the 14 days granted by Judge Di figlia's October 10 order. After a hearing on December 19, the court denied JHCC's motion because JHCC had not properly served

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[2] The court's order also noted that Abrahams's opposition to the demurrer "was untimely" and failed to comply with the California Rules of Court, and "caution[ed] [Abrahams] that future filings shall be in conformance with the Code and Rules of Court.".

All further rule references are to the California Rules of Court.

Abrahams with a notice of decision pursuant to Code of Civil Procedure, section 472b,[3] and consequently the 14-day period for amendment had not elapsed. (See §472b ["When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision"]. During the hearing, Abrahams attempted to reargue the court's earlier ruling on his motion for reconsideration, stating that the October 10 "order of the court, to me, is clearly wrong. I've been deprived of rights ... under the elder abuse statute. There is no question in my mind, Your Honor, that there's a three-year statute [of limitations]" for that cause of action. The court informed Abrahams that it had already ruled on his request for reconsideration and that Abrahams now needed to "amend [the] complaint ... within ... [the] 14 days [granted by] Judge Di Figlia."

On January 7, 2004, Abrahams filed a superseding "First Amended Complaint." The amended complaint realleged each of the causes of action contained in the original complaint, but specified that the causes of action that had been dismissed with prejudice on JHCC's initial demurrer were now solely alleged

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[3] All statutory references are to the Code of Civil Procedure unless otherwise specified.

against Premier Management. In addition, the amended complaint renamed (and amended) the first cause of action, previously titled "Elder Abuse Act," as "Breach of Contract." The complaint also added an eleventh cause of action for violation of Business and Professions Code section 17200. JHCC again demurred to the complaint.

The court held a hearing on the demurrer on February 20, 2004. At the hearing Abrahams argued briefly that his amended complaint should survive the demurrer, but then revisited the October 10 order, stating, "Your Honor, ... if you want to hear what my big concern is," "I do not know how my client ... doesn't have an action under the elder abuse statute. I know that Judge Di Figlia made a ruling," but the statute of limitations found in "section 338 applies," "[a]nd this court is obligated to reconsider the ruling." The court rejected Abrahams's request to revisit the October 10 order, and took the demurrer under submission.

On February 27, the court issued its ruling, partially sustaining JHCC's demurrer. The court overruled the demurrer to the causes of action alleged solely against Premier Management (the second, sixth, seventh, eighth, and ninth causes of action) because those "causes of action are not directed against the

demurring party, [JHCC]." The court also overruled the demurrer to the conversion cause of action and the cause of action for violation of Business and Professions Code section 17200. the court sustained the demurrer to the breach of contract cause of action (first cause of action), granting Abrahams 14 days' leave to amend to identify: (1) the contract that had been breached; (2) the manner in which it was breach; and (3) the damages sustained as a result of the breach. The court stated: "As currently [plead], [Abrahams] appears to mix claims of elder abuse, conversion, and misrepresentation into a breach of contract causes of action," which was problematic because the court "already ruled that claims of elder abuse are time-barred and now rules that claims of misrepresentation concerning medical services are time-barred as well." The order stated: "To the extent [Abrahams] is able to plead a breach of contract not sounding in elder abuse or medical malpractice, leave to amend is given."

The court sustained the demurrer without leave to amend on the fourth cause of action for breach of contract and rescission because that cause of action was "based on allegations or oral misrepresentations concerning the care and treatment [Abrahams's] decedent would receive" and consequently was time

barred pursuant ot sections 340.5 or 339. The court dismissed without leave to amend, as time barred under section 340.5, the fifth and tenth causes of action labled "Deceit" and "Fraudulent Misrepresenation." The court also granted JHCC's motion to strike Abrahams's requests for punitive damages, "sentimental value damages," and treble damages because the surviving causes of action of the complaint did not support such damages.

On March 6, Abrahams signed an ex parte request for extension of time to respond to the court's order. In the request, Abrahams argued that the court's ruling on JHCC's demurrer was erroneous, and also stated that he was required to be in Washington, D.C. for approximately four days, and needed "more time to prepare and file a motion for reconsideration." Abrahams requested a two-week extension until March 20. The ex parte request was not filed and the court did not rule on it.

On March 19, after filing an answer to the First Amended Complaint, JHCC again moved to dismiss the entire action, or in the alternative to dismiss the first cause of action (breach of contract), based on Abrahams's failure to file a second amended complaint as ordered. Abrahams filed an opposition to the motion, citing his ex parte request, and again disputing the underlying

ruling on the demurrer. On April 23, the court held a hearing on the motion to dismiss. The court explained that Abrahams's failure to follow correct procedures had resulted in his ex parte request for an extension not being filed.[4] Abrahams responded by reiterating his displeasure with the October 10 order dismissing his elder abuse cause of action, stating that the "guts of my action [have] been taken away for no reason"; Abrahams asserted that he had "been deprived of the elder abuse statute remedies" even though he "kn[e]w that the statute [of limitations] that applies to the elder abuse statute is three years." Abrahams added that he believed the court was biased against him. In response, the court explained that it would not entertain further argument on the October 10 order and, having heard no reason to excuse Abrahams's failure to file an amended compliant, the court announced, "The case is dismissed." The court's written order, issued immediately after the hearing (dated April 23, 2004),

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[4] The court stated: "It's my understanding that some ex parte papers were returned ... to you. You sent them in. You ... didn't come in for an ex parte request. [¶ So whatever you're asking for, ... you're not doing it appropriately." Consistent with the trial court's explanantion, the ex parte request included in the record on appeal does not have a file stamp, and is labeled by the court clerk in the Clerk's Transcript as "Provided by Appellant."

clarifies its oral statement, stating that "the motion to dismiss the *first cause of action* for breach of contract is granted." (Italics added.)

On May 14, Abrahams filed a notice of appeal, seeking review of the October 10 order as well as the February 27 and April 23 orders. On August 13, this Court dismissed the appeal as premature because "no appealable order or judgment has yet been entered." (See *Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 891 ["An order sustaining a demurrer is not appealable; an appeal lies only from the ensuing judgment of dismissal"].)

On November 19, Judge Lewis held a case management conference. At that conference, Abrahams contended that the court "does not have jurisdiction" because "[t]his case has been dismissed," and asked "the court to order the clerk to file an entry of judgment so I can appeal this case." The court disagreed, noting that "there are two remaining causes of action" – Abrahams's third cause of action for conversion and eleventh cause of action for violation of Business and Professions Code section 17200. The court set a discovery cutoff date of March 4, 2005, and a trial date of April 8, 2005.

After Abrahams failed to respond to JHCC's discovery requests, JHCC moved to compel responses, and later moved to dismiss the action as a sanction for Abrahams' failure ot comply with discovery requirements. Abrahams did not oppose the motions to compel or for terminating sanctions, and failed to appear at the hearing on the motion to compel. The court granted the motions to compel, ordering Abrahams to respond to the discovery requested withing 14 days. Abrahams did not do so. On June 10, 2005, the court dismissed Abrahams's action against JHCC as a sanction for failing to comply with the court's discovery order. In dismissing the action, the court noted Abrahams's failure to respond to discovery, and to appear for court hearings. The court then entered judgment, stating that "Final Judgemen shall be entered in favor of [JHCC]."[5]

This appeal followed.

II

DISCUSSION

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[5] The court's entry of judgment specifically noted that it was with respect to Abrahams's action against *JHCC*. Thus, contrary to Abrahams's contention on appeal, the trial court did not overlook the fact that Premier Management (who, arguably, never appeared in the action) failed to respond or object to Abrahams's causes of action against it.

Abrahams makes a number of assertions regarding purported error in the lengthy trial court proceedings. We analyze these contentions below.

A. *Abrahams's Failure to Properly Present His Appellate Arguments Constitutes a Forfeiture of the Marjority of His Contentions*

Abrahams, who represents himself on appeal, presents this court with a heartfelt, but unfocused discussion of the proceedings below. He relies on this court to connect the dots between the various grievances cited, and undeveloped (or in some cases unspecified) legal theories that presumably, in Abrahams's view, demonstrate trial court error necessitating reversal. This presentation misinterprets our role. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties" (*Paterno v. State of California* (1999) 74 Cal.app.4th 68,106); its role is to evaluate "'legal argument with citation of authorities on the points made'" (*People v. Stanely* (1995) 10 Cal.4th 764, 793). (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 283 [appellate court not "'required to perform tasks which are properly those of appellants' counsel'"].)

Abrahams's failure to present complete and coherent legal arguments is all the more significant in the instant case because, as

the appellant, it is his burden to overcome the presumption on appeal that the underlying judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [on appeal, judgment of the lower court is "*presumed correct*" and "error must be affirmatively shown"}.) Accordingly, as a consequence of Abrahams's failure to properly present his arguments on appeal, we deem the majority of Abrahams's contentions – consisting of stray, undeveloped arguments – to be forfeited, and do not address them. (*Evans v. Centerstone Development co.* (2005) 134 Cal.App.4th 151, 165 ["lack of organization and the improper format of appellate brief resulted in waiver of arguments alluded to but not properly developed]; *Wright v. City of Los Angeles* (2001) 93 Cal.app.4th 683, 689 ["Generally, asserted grounds for appeal that are unsupported by any citation to authority and that merely complain of error without presenting a coherent legal argument are deemed abandoned and unworthy of discussion"].)[6]

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[6] For context, we provide a few specific examples of the failings of Abrahams's appellate briefing. (1) Abrahams includes 16 separate subheadings purporting to be assignments of error, but the subheadings bear little or no relation to the argument that follows – a formidable obstacle to review and a violation of the Rules of Court. (See rule 14(a)(1)(B) ["Each brief must [s]tate each point under a separate heading or subheading summarizing

In the "interests of justic" we will address those of Abrahams's appellate contentions that are sufficiently concrete to merit consideration. (*Richmond Redevelopment Agency v. Western Title Guaranty Co.*(1975) 48 Cal.app.3d 343, 347 [considering appeal "in the interests of justice" despite fact that brief consisted of "nothing more than what amounts to a random and somewhat garbled recital of alleged grievances"].)

B. *Judge Lewis's Disqualification Is Not Reviewable on Direct Appeal*

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the point, and support each point by argument"]; *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 59 ["\we may disregard arguments not properly presented under appropriate headings'".) (2) Abrahams rarely cites to the pertinent portions of the 4-volume record, a failing most notable in light of Abrahams's total failure to identify and cite the particular legal rulings challenged in the various arguments he presents. When Abrahams does cite the record (or case authority), the citations often have no logical relationship to the argument being made – another violation of the Rules of Court. (Rule 14(a)(1)(B)-(C) ["Each brief must: ... support each point ..., if possible, by citation of authority [and s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].) (3) Abrahams fails to tailor his challenges to the applicable standard of review (or to even reference the standard of review) (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388 ["Arguments should be tailored according to the applicable standard of appellate review"].)

Abrahams devotes a significant portion of his briefing to various arguments suggesting that Judge Lewis should have recused herself due to an "appearance of partiality" against him in the proceedings below.[7] While we see absolutely nothing in the record to support Abrahams's contention that Judge Lewis's conduct was in any way inappropriate, we need not decide the issue (again) because the question of the propriety of a judge's refusal to recuse herself cannot be raised on direct appeal. Under section 170.3, subdivision (d), "[t]he determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to

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[7] On September 29, 2004, Abrahams filed a motion in the trial court seeking to disqualify Judge Lewis. The lengthy motion asserts as the primary ground for disqualification that Judge Lewis's rulings were contrary to established law. For example, the motion asserts that "Judge Lewis reflected bias by not following the law [or] the complaint and thereby depriving the plaintiffs of their entitlement to remedies under the Elder Abuse Statute." Judge Lewis rejected the request on the grounds that the motion was improperly served and "demonstrate[d] no grounds for disqualification." Abrahams then petitioned for a writ of mandate in this court, which we summarily denied.

the parties of the decision and only by the parties to the proceeding." Consequently, Abrahams's challenge in his direct appeal to Judge Lewis's failure to recuse herself must be rejected. (*People v. Panah* (2005) 35 Cal.4th 395, 444 (*Panah*) [rejecting challenge to judge's recusal decision on direct appeal].)[8]

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[8] Although Abrahams references "due process" in a portion of a subheading in his reply brief, he includes no argument or authority to support a contention that the trial court's actions in his case deprived him of constitutional due process. (*Panah, supra,* 35 Cal.4th at p. 445, fn. 16 [noting that "'a defendant may assert on appeal a claim of denial of the due process right to an impartial judge'"].) Abrahams also alludes to our power in unusual circumstances to treat a direct appeal as a writ of mandate. Abrahams fails to demonstrate any unusual circumstances that would justify treating his appeal as a writ in this case, and consequently we decline to do so. (*Olson v. Cory* (1983) 35 Cal.3d 390, 401 ["Though we... have power to treat [a] purported appeal as a petition for writ of mandate, we should not exercise that power except under unusual circumstances'].)

C. *The Court Did Not Err in Sustaining the Demurrer to the Elder Abuse Cause of Action of Abrahams's Complaint*

The core of Abrahams's challenge in the trial court and on appeal is directed at Judge Di Figlia's ruling that the elder abuse cause of action was barred by the statute of limitations. After reviewing that ruling, we conclude it was not erroneous.[9]

While the Elder Abuse Act is silent as to which statute of limitations applies, courts that have addressed the question have determined, as did Judges Di Figlia and Lewis in the instant proceeding, that section 335.1 is the applicable limitations period.[10] (§335.1 [two-year statute of limitations

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[9] While Judge Di Figlia's ruling on JHCC's initial demurrer is appealable (with respect to causes of action that were dismissed with prejudice), Judge Lewis's refusal to *reconsider* that ruling is not. (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 81 [holding that ruling on motion for reconsideration is not an appealable order, and noting that even courts that have allowed review of such motions will only do so where the motion for reconsideration was based on new *factual* information].)

[10] The Elder Abuse Act provides that "[w]here it is proven by clear and convincing evidence that a defendant is liable for physical abuse ... or neglect..., and that the defendant has been

for "[a]n action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another"]; *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 121, 125-126 ["The .. section 335.1 statute of limitations (applicable to causes for 'assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another') is facially applicable to elder abuse actions and provides a two-year limitation period"]; *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1515-1516 (*Smith*).) Abrahams provides no argument disputing the analysis of these courts, and we find their reasoning persuasive.[11] Thus, here, the applicable two-year

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guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, ... in addition to all other remedies otherwise provided by law," (1) the plaintiff can recover attorney fees, and (2) if the elder is deceased, his or her successor can recover damages for the elder's pain and suffering while still alive. (Welf. & Inst. Code, §15657.)

[11] Abrahams also appears to contend that because he theoretically could have recast his allegations under other legal theories, the trial court should have considered longer statutes of limitations periods for his claims. He is incorrect. "[I]n dealing with the statute of limitations, what is controlling is not the *nature* of the cause of action (in the sense of the legal theory), but the

statute of limitations period barred Abrahams's elder abuse cause of action, as the action was filed more than two years after Pearl Abrahams's death.

In addition to asserting that the trial court applied the incorrect statute of limitations, Abrahams suggests that the mere allegation in his complaint that the parties were, at one point, engaged in settlement discussions tolled the applicable statute of limitations.[12] He provides no authority for this

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gravamen of the cause of action (*Smith, supra,* 133 Cal.App.4th at p. 1525.) While Abrahams could, and did, attempt to recast his elder abuse claims under other legal theories, he was unable to change the gravamen of the those causes of action.

Similarly, Abrahams's related contentions that his causes of action for intentional infliction of emotional distress and lack of informed consent (which he attempts to characterize as "constructive fraud") should have survived demurrer are also without merit as the statute of limitations for those causes of action are equivalent or shorter than that for elder abuse. (See §335.1; *Trantafello v. Medical Center of Tarzana*(1986) 182 Cal.App. 3d 315, 322 & fn. 6.)

[12] Abrahams's first amended complaint alleged: "Plaintiffs made a written offer to settle the differences with Defendants on March 18, 2001, which was refused, and ongoing settlement negotiations have continued, and such has tolled the Statute of Limitations." While a trial court must "assume the truth of all properly pleaded facts, "in reviewing the sufficiency of a complaint, it need "give no credit to pleaded contentions or legal conclusions." (*Palacin v. Allstate Ins. Co.*(2004) 119 cal.App.4th 855, 861.)

contentio nd the authority is, in fact, to the contrary. (*Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573 ["'Clearly, an estoppel to plead the statute does not arise in every case in which there are negotiations for a settlement of the controversy'"].) A mere allegation of settlement discussions unaccompanied by allegations of specific "misrepresentations or promises on the part of defendant to support the claim that plaintiff was induced to delay the filing of her complaint in reliance thereon" is insufficient to defeat a demurrer on statute of limitations grounds. (*Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 679; *Jackson v. Andco Farms, inc.* (1982) 130 Cal.App.3d 475, 480.)[13]

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[13] Abrahams also asserts repeatedly that the trial court "erred as a matter of law by overruling *Delaney v. Baker* [(1999) 20 Cal.4th 23]," which he claims "rejected [JHCC's statute of limitations argument." We are unable to discern, and Abrahams fails to explain, what is meant by this contention, as *Delaney* did not address the statute of limitations for an elder abuse cause of action. To the extent Abrahams is citing *Delaney* for the proposition that his elder abuse claim was sufficiently pled to survive a demurrer had it been timely asserted, this contention is

D. *The Trial Court Did Not Abuse its Discretion in Dismissing Abrahams's First Cause of Action for Breach of Contract*

Abrahams appears to challenge the trial court's granting of JHCC's motion to dismiss his first cause of action for breach of contract – which was dismissed when he failed to amend the cause of action after JHCC's second demurrer was sustained. Abrahams first contends that the "sanction" of dismissal for his failure to amend was not supported by any statutory authority. The court, however, clearly has the statutory authority to dismiss a cause of action when "a demurrer to the complaint is sustained with leave to amend [and] the plaintiff fails to amend it within the time allowed by the court." (§ 581, sub. (f)(2); *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612 (*Leader*).)

Abrahams also argues that the trial court's authority to dismiss the breach of contract cause of action was precluded by his ex parte request. We disagree.

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irrelevant as the cause of action was dismissed on statute of limitations grounds.

Abrahams has not met his burdern of demonstrating an abuse of discretion here for at least two reasons. First, Abrahams's ex parte request for extra time to respond to the ruling on the demurrer provided no compelling ground for denying JHCC's motion to dismiss. Moreover, the ex parte request was not properly filed and consisted primarily of improper reargument of the ruling on the demurrer.

Second, Abrahams failed in his ex parte request and at the hearing on the motion to dismiss to present any reason to believe that granting him further time would result in the filing of an amended complaint. Rather, as the trial court noted, Abrahams – who stated at the hearing that without the elder abuse cause of action, "there is no way that... I can go forward without this" – was not seeking more time to file an amended complaint, but rather to pursue his appellate remedies.

Given these factors, we cannot find an abuse of discretion in the court's dismissal of Abrahams's first cause of action. The dismissal was reasonably based on

Abrahams's unexcused failure to amend the cause of action in the time provided by the court.[14]

E. *Sanctions Are Not Warranted*

JHCC requests that we impose sanctions against Abrahams for filing a frivolous appeal. (See §907 ["When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just"].) Although the question of whether sanctions are appropriate is a close one, we deny JHCC's request.

JHCC's principal argument that the instant appeal is frivolous is an erroneous contention that the rulings sustaining JHCC's two demurrers are not properly before this Court because Abrahams's violation of a discovery order

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[14] Abrahams also contends that he included sufficient factual allegations for his fraud claims to survive demurrer. This may well be, but Abrahams makes no argument that the ground upon which the trial court actually ruled – that the fraud claims were barred by the statute of limitations – was erroneous. Because Abrahams makes no challenge to the trial court's *ruling* dismissing his fraud claim, simply asserting that a hypothetical alternate ground for the ruling was not supported, we must presume that the ruling was correct. (*Denham, supra,* 2 Cal.3d at p. 564.)

resulting in a termination sanction is "[t]he only reason this case was dismissed." While JHCC is correct that the two remaining causes of action in Abrahams's lawsuit were dismissed as a discovery sanction, that fact does not prevent Abrahams, after entry of a final judgment, from challenging the earlier rulings sustaining JHCC's demurrers. (See *Jennings v. Marralle*(1994) 8 Cal.4th 121, 128 {"On appeal from a superior court judgment, 'the reviewing court may review ... any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party,'" quoting §904.1].)

In light of the lack of merit of JHCC's argument in support of sanctions and the fact that certain of the issues raised in Abrahams's appeal are arguably colorable, although inartfully presented, we decline to award sanctions. While we agree with JHCC that Abrahams's appeal lacks merit, we do not deem it "so utterly devoid of potential merit as to justify sanctions." (*Abdallah v. United Savings Bank* (1996)

43 Cal.App.4th 1101, 1112 ["Although certain of appellants' arguments could be deemed to be frivolous, we are unable to conclude that the appeal as a whole is so utterly devoid of potential merit as to justify sanctions"].)[15]

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[15] We deny Abrahams's conclusory request in his reply brief that we take judicial notice of the "Petitioners Writ of Mandate, Prohibition, and Certioari" in case number D046083, as the request is procedurally improper. (See rule 22(a) [requiring party requesting judicial notice to "serve and file a separate motion with a proposed order" and "[I]f the matter to be noticed is not in the record," to "serve and file a copy [of the matter to be noticed] with the motion or explain why it is not practicable to do so"].)

DISPOSITION

Affirmed.

/s IRION, J

WE CONCUR:

/s/ McCONNELL, P.J.

/s/ HUFFMAN, J.

THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CHARLES L. ABRAHAMS, ET AL.	) Case No. GIC 811639
Plaintiffs,	) ORDER STRIKING VERIFIED STATEMENT OF CHARLES L.
vs.	) ABRAHAMS TO DISQUALIFY JUDGE JOAN M. LEWIS
JACOB HEALTH CARE CENTER, LL., et al.	)
Defendants.	) (FILED SEPTEMBER 30, 2004)

The court has reviewed the Declaration of CHARLES L. ABRAHAMS, and the papers filed therewith (hereinafter referred to collectively as plaintiff's "Verified Statement"), filed but not served on September 29, 2004. The Verified Statement demonstrates no grounds for disqualification of Judge Joan M. Lewis and was not properly served. Therefore, the challenge is stricken for the reasons cited below.

I. Authority to Strike the Challenge.

Challenges filed pursuant to Code of Civil Procedure[1] section 170.1 are adjudicated under the procedures set forth in section 170.3. Pursuant to section 170.3, if a judge who should disqualify his or her self fails to do so, any party may file with the clerk a verified written statement setting forth facts constituting grounds for disqualification. The statement seeking to disqualify the judge "shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party of his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers." (§ 170.3, subd. (c)(1).)

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[1] Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

Once objection has been made, the judge may, within 10 days after service of the objection, "file a consent to disqualification" (§ 1703.3, subd. (c)(3)); or file "a written verified answer admitting or denying any or all of the allegations...." (*Id.*) Failure to take any action is tantamount to consenting to disqualification. (§170.3, subd. (c)(4); *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22, 26.) However, if the statement is untimely filed, has not been served, or on its face discloses no legal grounds for disqualification , the judge against whom it is filed may strike it, so long as he or she does so within the 10-day period prescribed in section 170.3, subdivision (c)(3) for filing an answer. (§170.4(b).) In striking a challenge the court is not passing on its own disqualifications, but instead is passing only on the legal grounds set forth in the Verified Statement.

Should the 10-day period pass with the judge taking no action, the judge is deemed disqualified and has no power to act in the case. (§170.4, subd.(b); *Lewis v. Superior Court* (1988) 198 Cal.App.3d 1101, 1104.)

Here, there was no service on Judge Lewis or her clerk and the Verified Statement discloses no legal grounds for disqualification.

II. Improper service.

Section 170.3 (c)(1) requires that copies of the challenge for cause be personally served on the judge being challenged, or on her clerk provided that the judge is present in the courthouse or in chambers. Here, Judge Lewis was not personally served nor was the clerk. The Verified Statement is stricken for lack of service.

III. The Factual Allegations.

In the instant case, plaintiff seeks to disqualify this court pursuant to Code of Civil Procedure §170.1 (a)(6)(C) which provides a judge is disqualified if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." The standard is articulated in *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97.

However, there are well-established limitations on what evidence may be used to establish bias under section

170.1(a)(6)(C). Section 170.2 expressly provides that it shall not be grounds for disqualification where the judge has "in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1." A legal ruling is insufficient to establish bias or prejudice, even if erroneous. (*Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719.) Further it is not evidence of prejudice or bias when a judge, expresses an opinion based upon actual observances and in what he or she considers the discharge of his or her judicial duty. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1031; *Shakin v. Board of Medical Examiners* (1967) 254 Cal.App. 2d 102, 116.)

A judge also has the right and duty to control proceedings in the courtroom. Section 128 provides "every court shall have the power to...preserve and enforce order in its immediate presence" and "provide for the orderly conduct of proceedings before it."

In support of the allegation of bias plaintiff has filed a declaration that reads more like an appellate brief than a challenge for cause. Plaintiff utilizes the bulk of 24 pages to explain the various and myriad of ways her argues Judge Lewis has made errors of law in this case. Similarly, the Points and Authorities concentrate solely on showing that Judge Lewis is not impartial (*note: in the Order, the word "not" is in writing)* because she has ruled against him. Notwithstanding the position taken by plaintiff, it is clear that the authorities cited above require that these issues be addressed by the Court of Appeal rather than by a challenge to the trial judge. Beyond this improper material, the Verified Statement is devoid of any allegations of fact that may legally support disqualification of a judicial officer for bias.

Therefore, because the facts presented in the Verified Statement do now show any bias on the part of the trial judge, nor do they support any reasonable conclusion that Judge Lewis is biased, plaintiff's challenge is properly stricken and this court may hear any further matters that may come before it in these proceedings.

IT IS HEREBY ORDERED that the Verified Statement of CHARLES L. ABRAHAMS, filed September 29, 2004, challenging Judge pursuant to CCP 170.1(a)(6), is stricken for the reasons stated above.

This order constitutes a determination of the question of disqualification of the trial judge pursuant to Code of Civil Procedure 170.3(d).

IT IS SO ORDERED.

Dated this 30th day of September, 2004.

/s/ Hon. Joan M. Lewis
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

CHARLES L. ABRAHAMS for the Estate of Pearl Abrahams; and CHARLES L. ABRAHAMS, individually,	**No. GIC811639**
Plaintiffs,	**PLAINTIFFS' MOTION TO DISQUALIFY THE HONORABLE JOAN M. LEWIS**
v.	I/C Judge: Honorable Joan M. Lewis Dept: 65
JACOB HEALTH CARE CENTER, LLC; PREMIER MANAGEMENT, INC.; and DOES 1 through 50, inclusive,	Hearing Not Required (FILED SEPTEMBER 29, 2004)
Defendants.	

TABLE OF CONTENTS

1. Judge Joan Lewis breached Canon 3 of the ABA Judicial Code aka Cal. Code Jud. Ethics and should recuse herself because there has been an appearance of partiality reflected by these violations 1

2. Judge Lewis should disqualify herself because she made rules contrary to the Constitution and Legislative provisions..... 15

3. Judge Joan Lewis should disqualify herself because the Judge changed without prior notice well established rules of procedure and deprived Plaintiffs of Due Process by not giving the Plaintiffs the right to be heard..... 16

4. Judge Joan Lewis should recuse herself because well established principles and rules regarding demurrers were not applied before sustaining the demurrers attacking the request for damages without leave to amend..... 19

5. Judge Joan Lewis should recuse herself because the Judge ignored the purpose of Section 1008 of the Code of Civil Procedure and has not properly exercised the court's inherent powers 21

6. Judge Joan Lewis should recuse herself because this case was dismissed and Judge Lewis refused to perform the ministerial duty of filing or requesting the clerk to enter a judgment; there is a clear inference of partiality in favor of Defendants, especially since Judge Lewis ignores Plaintiffs' pleadings the law established in their request for entry of judgment 26

7. An appealable order once rendered cannot be changed or modified and this Judge's refusal to Enter the Judgment shows a partiality towards the Defendants and reason for disqualification..... 31

TABLE OF AUTHORITIES

Cases

Albermont Petroleum Ltd, v. Cunningham,
(1960)186 Cal.App. 2d 84 20
Armstrong v. Manzo
(1965) 380 U.S. 545, 552 31
Bank of America v. Superior Court
(1942) 20 Cal.2d 697 29
Bauguess v. Paine
(1978) 22 Cal.3d 626 22
Berger v. U.S.
(1921) 255 U.S 22 7
Brydonjack v. State Bar
(1929) 208 Cal. 439, 442 18
California Assn. of Psychology Providers v. Rank,
(1990) 51 Cal. 3d 1, 3 43
Cannon v. Commissioner on Judicial Qualification
(1975) 14 Cal.3d 678, 695 38
Carlson v. Dept. of Fish & Game
(1998) 6 Cal.4th 1268, 1272 20
Catchpole v. Brannon
(1995) 36 Cal.App.4th 237 36
D'Hondt v. Regents of University of California
(1984) 153 Cal. App. 3d 723 43
Daar v. Yellow Cab Co.
(1967) 67 Cal.2d 695 39
De La Beckwith v. Superior Court
(1905) 146 Cal.496, 500 27
Douglas v. California
(1962) 372 U.S. 353, 356 ..... 35, 37
Edgar v. K.L.
(7th Cir. 1996) 93 F.3d 256 9
Fletcher v. Commission on Judicial Performance
(1998) 19 Cal.4th 865 ..... 12, 14
Fuentes v. Shevin
(1971) 407 U.S. 67, 83 ..... 4, 31
Gallagher v. Municipal Court
(1948) 31 Cal.2d 784 29

Griffin v. Illinois
(1955) 351 U.S. 12 37
Harth v. Ten Eyck
(1941) 16 Cal.2d 829, 834 26
Hays v. Superior Court
(1940) 16 Cal.2d 260, 264 26
Helbush v. Helbush
(1930) 209 Cal. 758 19
Herrscher v. Herrscher
(1953) 41 Cal.2d 300, 304 42
In re Bernard
(9th Cir. 1994) 31 Fed. 3d 842, 847 1
In re Boston's Children First
(1st Cir. 2001) 244 Fed.2d 164 3
In re Marriage of Flaherty
(1982) 31 Cal.3d 637, 651-654 11
In re Marriage of Iverson
(1992) 11 Cal.App.4th 1505 36
In re Marriage of Quinlan
(1989) 209 Cal.App.3d 1417 21
Kalmus v Kalmus
(1951) 103 Cal.App.2d 405 38
Kilgore v. Younger
(1982) 30 Cal.3d 770, 781 25
Kloepfer v. Commission on Judicial Performance
(1989) 49 Cal.3d 826, 838 ..... 13, 17
Lane v. Pellissier
(1929) 208 Cal. 590 40
Liljeberg v. Health Services Acquisition Corp.
(1988) 486 U.S. 847 16
Liteky v. United States
(1994) 510 U.S. 540 ..... 15, 16, 34
Lynch v. San Francisco Housing Authority
(1997) 55 Cal.App.4th 527, 531 25
McLaughlin v. Superior Court
(1954) 128 Cal.App.2d 62, 65 ..... 22, 23
McMahon v. Hetchy-hetchy Etc. Ry. Co.
(1905) 2 Cal.App. 402 41
McVey v. McVey
(1955) 132 Cal.App.2d 120, 123 29

O'Brien v. CSEA
(2nd Dist. 1983) 148 Cal.App.3d 957 11
Offutt v. United States
(1954) 348 U.S. 11, 14 ..... 16, 30
Olivera v. Grace
(1942) 19 Cal.2d 570 40
Passavanti v. Williams
(1990) 225 Cal.App.3d 1602 40
People v. Castello
(1998) 65 Cal.App.4th 1242 ..... 26, 27
People v. Jordan
(1884) 65 Cal. 644 19
Pratt v. Pratt
(1903) 141 Cal. 247, 252 17
Reserve Mining Co. v. Lord
(8th Cir. 1976) 529 F.2d 181 10
Speegle v. Board of Fire Underwriters
(1946) 29 Cal.2d 34, 42 24
UAP-Columbus JV 326132 v. Nesbitt
(1991) 234 Cal.App.3d 1028, 1034 40
United Farm Workers of a America v. Superior Court
(1985) 170 Cal.App.3d 97, 104-105 36
United States v. Chronic
(1984) 466 U.S. 648,655 35
Webber v. Webber
(1948) 33 Cal. 2d 153 37
Woods v. Rechenmacher
(1942) 53 Cal.App.2d 294 42
Yancey v. Fink
(1991) 226 Cal.App.3d 1334 41
Zelig v. County of Los Angeles
(2002) 27 Cal.4th 1112, 1126 24

Statutes

Civil Code section 3335.....3
CCP section 128.5.....9, 17
CCP section 170.....12
CCP section 170.1, subd. (a) (6).).....14
CCP section 177.5.....17
CCP section 1008 25

ABA JUDICIAL CODE

CANON 3.....1, 2
CANON 3 B (1).....3
CANON 3 B (2.....5
CANON 3 B(4).....5, 6
CANON B (5).....6, 7
CANON B (7).....8, 10

Miscellaneous

Cal. Const., Art. I, Section 7..... 18
Cal. Const., Art. VI, Section 18, Former Subd.(C);
Now Cal. Const., Art. VI. Section 18, Subd.().....12
California Rules of Court Rule 309.....27
U.S. Const., 14th Amend.; 18, 30

1. **Judge Joan Lewis breached Canon 3 of the ABA Judicial Code aka Cal. Code Jud. Ethics and should recuse herself because there has been an appearance of partiality reflected by these violations.**

In re Bernard, (9th Cir. 1994) 31 Fed. 3d 842, 847, the Ninth Circuit reflected an attorney's obligation to maintain the integrity of our system. obligation applies to both federal and state cases.; Counsel who believes a judge's impartiality is reasonably subject to question,

> has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court. Judges are not omniscient and, despite all safeguards, may overlook a conflict of interest". A lawyer who reasonably believes that the judge before whom he is appearing should not sit must raise the issue so it may be confronted and put to rest. Any course would risk undermining public confidence in our judicial system. *In re Bernard* 31 Fed. 3d at p. 847.

Pursuant to the canons of judicial ethics, every judicial officer must satisfy himself or herself that he or she is actually unbiased toward a party and, such is based on a universal standard, that her impartiality is not reasonably subject to question. The following canon is important to the administration of justice.

CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE PARTIALLY AND DILIGENTLY

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

Judge Joan Lewis breached CANON 3 of the American Bar Association Judicial Code in many respects and case law has supported the proposition that a breach of judicial ethics in most instances is automatically disqualifying. *In re Boston's Children First* (1st Cir. 2001) 244 Fed.2d 164. Judges have a sworn duty to adjudicate as proscribed by law. Judge Joan Lewis ignored the relevant procedural statutes and thereby rewrote the standards to be applied when demurrers are filed. Judge Lewis did not

follow established procedures regarding *ex parte* hearings; this gives the appearance of partiality.

CANON 3 B (1) states that a judge is required to hear and decide matters except when disqualification is required. This Canon has been breached and Judge Lewis has an obligation to recuse herself sua sponte when it became obvious, when pointed out, that the Judge's tentative decisions were not supported by law or fact. When Judge Lewis was apprised of the errors at hearings, the Judge persisted in perpetuating the errors. plaintiffs arguments. (see Declaration of Charles L. Abrahams, paragraphs 1-8, 16, 18-19, 21, 23-42, 45-48 filed herewith, hereinafter Abrahams Decl. "¶".)

Judge Joan Lewis should have recused herself when she promised to consider defendant Premier Management's failure to answer and then did not address the issue; and also when striking the prayer for sentimental value. The Judge stated in her tentative ruling that citations were necessary to pray for damages. Even though Mr. Abrahams discussed the authorities, applying Civil Code section 3335, the tentative ruling was adopted

verbatim. (Abrahams' Decl., ¶¶. 6-7, 16, 24, 29 and 34.)

Judge Lewis did not provide to plaintiffs a meaningful hearing. The U.S. Supreme Court in *Fuentes v. Shevin* (1971) 407 U.S. 67, 83 explained the importance of a meaningful hearing.. The Court stated that because of private gain, there is a great danger that confidence in an attorneys' client's case "will be misplaced". ...

> Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides-and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. (*Ibid.)*

(See Abrahams' Decl., ¶¶1-39.)

The most glaring breach of ethics is an unusual one. CANON 3 B (2) requires a judge to be faithful to the law and maintain professional competency, implicit in Canon 3 B (2) is the judicial obligation to read, consider, and weigh the contentions in the pleadings of both parties and render a decision based on the law as applied to the facts, or in this case the factual allegations in the complaint. Competency can only be gained by reading the pleadings of both parties and a judge cannot be faithful to

any law if the law is cited and explained and then ignored. (Abrahams' Decl., ¶¶6-7, 10-12, 14, 16-17, 19, 24, 27-28, 34-35, 40.)

CANON 3 B (4) states:

> A Judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity and shall require conduct of lawyers, and of staff, court officials, and others subject to the judge's direction to control.

There is no question that Judge Lewis breached CANON 3B(4) by requiring a bailiff to escort Mr. Abrahams out of the courtroom after warning him not to express himself when he started to respond to Mr. Berg's statement. Abrahams' Decl., ¶¶42-48.)

Judge Lewis reflected bias by not following the law nor the complaint and thereby depriving the plaintiffs of their entitlement to remedies under the Elder Abuse Statute. (Abrahams's Decl., ¶¶ 10-17, 34 d-g., 35 a., b., e-g.)

CANON B(5) states:

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

> ... A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute... A judge must be alert to avoid behavior that may be perceived as prejudicial.

Once a motion for disqualification is filed, the judge must pass on the legal sufficiency of the declaration but may not pass on the truth of the matters alleged. *Berger v. U.S.* (1921) 255 U.S 22. Disqualification of a judge is self-enforcing and a motion and hearing is not required. It is improper to receive any feedback from the defendants' attorney, therefore, the Court is required to consider this motion to determine whether there is an

appearance of partiality.

Judge Lewis must obey Canon B (5) and the undersigned pointed this out at the February 20, 2004 hearing. (Abrahams' Decl., ¶41.)

Canon B (7) requires a judge to provide to every person the right to be heard according to law. The Judge is also prohibited under that Canon to permit or consider ex parte communication or other communications made to the judge outside the presence of one of the parties concerning a pending proceeding.

CANON B (7) states:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstance require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) The judge reasonably

> believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond ...
>
> (e) A judge may initiate or consider any ex parte communications when expressly authorized to do so by law

When there were allegations that a judge engaged in ex parte communications with counsel trying to prompt a settlement, such allegations were sufficient to require the judge's recusal. Taking the allegations as true, the judge's impartiality, though only related to sentencing of a criminal might reasonably be questioned. *U.S. v. Forest* (3rd Cir. 1989) 886 F.2d 558.

In *Edgar v. K.L.* (7th Cir. 1996) 93 F.3d 256, a judge was disqualified because he repeatedly went outside the presence of counsel to meet with experts to discuss the merits of a case. (*Id.* at p. 258.) Because the judge did not disclose what happened, it was assumed the merits of litigation were discussed and the judge should have been

disqualified.

Judge Lewis has breached Canon B (7) especially since the court reporter, even though asked to, did not transcribe the discussion that took place when Mr. Abrahams was being ejected. (Abrahams' Decl. ¶¶5.e., 15, 25, 27, 35, 40, 42-26, 49.)

The Eighth Circuit in *Reserve Mining Co. v. Lord* (8th Cir. 1976) 529 F.2d 181 ruled that

> (a) judge best serves the administration of justice by remaining detached from the conflict between the parties. (*Id.* at p. 186.) By assuming the roles of judge, attorney and witness in the same proceeding the trial judge abandons the impartiality with which he is charged . . . .

The Court failed to meet the requirements of Code of Civil Procedure section 128.5 by explaining the circumstances and justification for sanctions resulting in dismissals. *O'Brien v. CSEA* (2nd Dist. 1983) 148 Cal.App.3d 957.

"Constitutional due process principles are offended by the summary imposition of sanctions." *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 651-654. When the

Declarant attended an ex parte hearing to schedule another demurrer with Judge Lewis, the notice given to plaintiffs was inadequate. (Abrahams' Decl. ¶¶47-49.) Such " was a flagrant violation of due process principles". Notice is essential especially when the Defendant rushes to compel sanctions on an ex parte basis. *O'Brien* at p. 962. (Abrahams' Decl. ¶¶42-45, 48-49.)

Commentary:

> ... Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Judge Lewis did not consider the plaintiffs' motions for reconsideration or clarification and repeated arguments were ignored even though such was intended to prevent the resolution of the issues without the expense of appeal and a needless trial and then a remand. (Abrahams' Decl., ¶¶6, 7, 9, 11-14, 16, 19, 23, 24, 26, 29-30, 34.b –k. 35.)

In *Fletcher v. Commission on Judicial*

Performance (1998) 19 Cal.4th 865, the California Supreme Court found that a Judge should be removed because of wilful misconduct "and conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, Section 18, former subd.(c); now Cal. Const., art. VI. Section 18, subd.(d).)

The California Supreme Court stated that judges should be expected to comply with the canons. "Failure to do so suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838, fn 6.

Judge Fletcher was removed because he engaged in ex parte communications and because he changed his order in the minutes. The Supreme Court pointed out that there is a compelling public interest in maintaining a judicial system that is in fact and that as the public perceives, to be fair, impartial and efficient. Judges cannot be an advocate for any party and must be perceived to be neutral arbiters of both facts and law and who apply the law uniformly and consistently. There is no question that

the failure to appear impartial must result in a disqualification of a judge.

The *Fletcher* Supreme Court repeated the mandate of CCP 170 by stating:

> . . . By statute, a judge "shall be disqualified" if "i[f]or any reason (A) the judge's believes his or her recusal would further the interests of justice (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc., § 170.1, subd. (a) (6).)

The California Supreme Court in *Fletcher* at page 886 denounced the kind of practice of Judge Lewis, which is to allow her clerk(s) to make decisions without supervision. This inference was obvious at hearings when Judge Lewis was not aware of the contents of the complaint or tentative decisions. The Supreme Court indicated that judicial decision-making may not be delegated to any other court official and a judge who improperly delegates judicial powers commits "judicial misconduct".

The U.S. Supreme in *Liteky v. United States* (1994) 510 U.S. 540 made it clear that a judge's attitude may be disqualifying if the judge's trial rulings reflect extra judicial knowledge or motives. When the Court exceeds its authority by definition there is an extra judicial motive. There has been no question that when judicial rulings reflect a pervasive bias the judge should disqualify him or herself. *Liteky* at p. 545.

The Supreme Court in *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847 stated that what matters is not the reality of the bias or prejudice but its appearance. Judge Lewis gave the appearance of partiality, as discussed herein. (Abrahams' Dec., ¶¶1, 3, 4-9, 11-15, 9, 23-26, 33-39, 42-49.)

Our judicial system is based on fairness to litigants. In *Liteky*, the standard for disqualification was announced:

> Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude, or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.

> Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case. In matters of ethics, appearance and reality often converge as one. See *Offutt v. United States* (1954) 348 U.S. 11, 14. ([J]ustice must satisfy the appearance of justice.)

In *Pratt v. Pratt* (1903) 141 Cal. 247, 252, it was stated "[t]he trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand."

The Supreme Court in *Kloepfer, supra,* at p.838, stated the Canons do not have the force of law, but "They reflect a judicial consensus regarding appropriate behavior." It is obvious these Canons should be guides for a judge and a violation should result in disqualification. The Supreme Court in *Kloepfer* stated a judge need not seek to harm a litigant or an attorney; "disregard for the legal system in general will suffice" for disqualification.

Every democratic judicial system should safeguard against tyranny, tyrannical governments have punished those who are weak or helpless politically especially those

who would not conform and resist tyranny. Anyone who has power should be sensitive to its possible abuse.

A judge should not be reluctant to reconsider past rulings when apprised of possible errors of law and should have listened to the undersigned, not eject him from the courtroom. There is a clear inference that can be drawn when Judge Lewis did not recognize the purpose of plaintiffs' motions and Judge Lewis revealed a lack of sensitivity to the goal of fairness there was an appearance of partiality and is disqualifying according to California and U.S. Supreme Court mandate. By ignoring statutes and, in effect, rewriting them, Judge Lewis has violated the doctrine of separation of powers which is enshrined in the constitution and is fundamental to the preservation of our civil liberties. *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442.

2. **Judge Lewis should disqualify herself because she made rules contrary to the Constitution and Legislative provisions.**

Courts have an inherent power to make rules or procedure but such power is not absolute but restricted

because new rules cannot conflict with constitutional or legislative provisions. *People v. Jordan* (1884) 65 Cal. 644. Judge Lewis has not adhered to this principle and should disqualify herself.

Rule making has been the duty of the Judicial Council and the Judicial Council derives it powers from the California Constitution Article VI, these rules have the force of law and are binding on this Superior Court and the parties as procedural statutes. *Helbush v. Helbush* (1930) 209 Cal. 758.

When local rules are changed by Judges the reviewing court will reverse any decision based on the improperly modified local rules because the rule conflicts with higher law. *Albermont Petroleum Ltd, v. Cunningham,* 186 Cal.App. 2d 84 (1960)

3. **Judge Joan Lewis should disqualify herself because the Judge changed without prior notice well established rules of procedure and deprived Plaintiffs of Due Process by not giving the Plaintiffs the right to be heard.**

Judge Lewis dismissed the complaint without giving the Plaintiffs the opportunity to establish that there

is no procedural rule which requires a hearing when an extension of time to file an amended complaint is filed. (Abrahams' Decl. ¶¶31:41.) The Court was obligated to file the plaintiffs' motion when submitted and to consider that request, which according to legal principles should not have resulted in dismissal of the case. *Carlson v. Dept. of Fish & Game* (1998) 6 Cal.4th 1268, 1272.

Mr. Abrahams had the right to expect the Court to read his pleadings and consider the motion for an extension of time which he understood was still pending at the time of the hearing.

Sanctions may not be imposed under Code of Civil Procedure section 128.5 without notice and an opportunity to respond. *In re Marriage of Quinlan* (1989) 209 Cal.App.3d 1417. The imposition of sanctions under Code of Civil Procedure sections 128.5 or 177.5 requires procedural due process. Judge Lewis repeatedly failed to consider plaintiffs' contentions and to enforce statutes, thereby giving the appearance of partiality. (Abrahams; Decl., paras 5.c., 6-7, 12-14, 17-19.) Those sections and the Constitution require notice and an opportunity to be

heard before being deprived of damages by striking the prayer in a complaint. U.S. Const., 14th Amend.; Cal. Const., art I, Section 7; *Bauguess v. Paine* (1978) 22 Cal.3d 626.

The Supreme Court in *Bauguess, supra,* at page 638, warned that the Courts inherent powers to punish misconduct

> . . . may imperil the independence of the bar and thereby undermine the adversary system. In cautioning trial courts to use their contempt powers with care, this court has repeatedly stressed the importance of permitting counsel to be a vigorous advocate. (13) "He has a right to press a legitimate argument and to protest an erroneous ruling." ([Citation.] at p. 638.)

The Court in *McLaughlin* stated that one may not be held in contempt for violating a court order unless this order is valid and enforceable. In addition, a court has no power, having once made a decision after regular submission, to set aside the judgment or order for judicial error. *McLaughlin v. Superior Court* (1954) 128 Cal.App.2d 62, 65. Judge Lewis should disqualify herself for favoring Defendant by ignoring precedents.

Mr. Abrahams explained to Judge Lewis that he did not receive the motion for extension of time back from the Court and believed that Judge Lewis had to rule on his motion to extend the court deadline before he had to file an amended complaint. (Abrahams' Decl., ¶¶ 31-35, 40-41.) A mere mistaken act by Counsel cannot render him in contempt of court, and this applies even if the legal proposition that is urged is untenable so long as the attorney is good faith. *Bauguess* at p. 638. An attorney may not be punished for contempt when he is honestly mistaken in his interpretation of the law so long as he expresses his view in a proper and respectful manner. *Bennett v Superior Court* (1946) 73 Cal.App.2d 203. Plaintiffs were sanctioned for protecting their interest. (Abrahams; Decl., ¶¶ 12-14, 17, 19, 23-24, 26, 29-30, 34-46.)

4. **Judge Joan Lewis should recuse herself because well established principles and rules regarding demurrers were not applied before sustaining the demurrers attacking the request for damages without leave to amend.**

The California Supreme Court in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, announced well-settled rules to determine the sufficiency of the

complaint against a demurrer. Courts have been guided by long settled rules. Judge Lewis was not so guided. (Abrahams' Decl., ¶¶ 5.c., 6-7, 10-14, 19, 24-30.) The Court must give a complaint a reasonable interpretation by reading it as a whole and its part in their context to determine its sufficiency. *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42. The *Speegle* Supreme Court repeated the guiding prerequisites when determine sustain a demurrer by stating:

> when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not., there has been no abuse of discretion and we affirm. *Kilgore v. Younger* (1982) 30 Cal.3d 770, 781.

Judge Lewis should not have sustained the demurrers without granting plaintiffs leave to cure defects. There is no authority to disallow certain damages allowed by statute; this Judge should disqualify herself because there is an appearance of partiality by overruling Supreme Court decisions cited by the plaintiffs in their opposition to the demurrers. "When a trial court sustains a demurrer,

'[r]eversible error exists if these facts show entitlement to relief under any possible legal theory.'" *Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527, 531.

5. **Judge Joan Lewis should recuse herself because the Judge ignored the purpose of Section 1008 of the Code of Civil Procedure and has not properly exercised the court's inherent powers**

Judge Joan Lewis should recuse herself because she did not enforce the Elder Abuse Statute according to its clear terms and legislative intent nor consider the significance and purpose of section 1008 of the Code of Civil Procedure She has not exercised the court's inherent powers to ensure the orderly administration of justice. *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264; *People v. Castello* (1998) 65 Cal.App.4th 1242.

It is well settled that a court has jurisdiction to reconsider its rulings when a motion is filed after having once denied it. *Harth v. Ten Eyck* (1941) 16 Cal.2d 829, 834.

The record of the April 23, 2004 hearing leads to the conclusion that the dismissal of the complaint was

made because the plaintiffs filed several motions for reconsideration and continued to assert their rights. (Abrahams' Decl., ¶¶ 6-18.) In the record, Judge Lewis was apprised by the plaintiffs in their pleadings that the inability of the Court to correct an error prior to trial and appeal is "a serious impediment to a fair and speedy disposition of causes." *De La Beckwith v. Superior Court* (1905) 146 Cal.496, 500. "A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors . . ." *People v. Castello* (1998) 65 Cal.App.4th 1242, 1249.

Mr. Abrahams obviously antagonized the Court when he repeated his contentions, even though Mr. Abrahams was attempting to protect his client and save judicial time and expense. When Mr. Abrahams explained that Judge Lewis had ignored the statutes when deciding prior motions, he was escorted by a bailiff from the courtroom. Ex parte consideration by considering only the defendants' pleadings continued. Even though Mr. Abrahams was respectful, the Judge continued to listen to

the defendant's counsel and turned a deaf ear to Mr. Abrahams and silenced him, denying plaintiffs their rights. The hearings appeared to be held to allow the defendant to explain to the Judge Lewis how to rule in his favor and support the judge's pre-judgment of the issues or to further understand what defendant wanted in order to rule in defendant's favor; any reasonable observer knowing the record, would draw this inference. (Abrahams' Decl., exh. I, ¶¶ 39-45.)

Plaintiffs' counsel acted in due course in the proceedings and attempted to protect his client. The Supreme Court in *Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, stated, "[a]n attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling." *Id.* At p. 796.

A Trial Judge should not prejudge issues but should keep an open mind. Not only should the hearings and decisions be fair in fact, but it should also appear to be fair. *McVey v. McVey* (1955) 132 Cal.App.2d 120, 123. A judge is not obligated to approve of every statute or

precedent but it is Judge Lewis' sworn duty to enforce the statutes because of its clear language. *Id.* at p. 124.

At any time prior to a final judgment, a court may consider it's ruling on a demurrer even if a request was not made. *Bank of America v. Superior Court* (1942) 20 Cal.2d 697.

When there is a personal antagonism between judge and a party, such interferes with the administration of justice. Judge Lewis has evidenced personal antagonism toward a party by dismissing the complaint and ejecting Mr. Abrahams from courtroom 65, and when such is unjustified under the circumstances, Judge Lewis violated Mr. Abrahams' due process rights and that is a basis for recusal. *Offutt v. U.S.* (1954) 348 U.S. 11.

A meaningful hearing is fundamental because there can only be fairness in order to safeguard due process. Congress and the Legislature in order to safeguard fundamental requirements of fairness require a judge to provide a full hearing and a meaningful review to every litigant. Judge Lewis has repeatedly shown a pervasive bias against plaintiffs by refusing to consider and address

the plaintiffs' contentions. When made aware of due process violations, instead of rectifying errors Judge Lewis has sanctioned Counsel, manifesting a personal antagonism because he asserted his rights and those of his client. (Abrahams Decl., ¶¶12-14, 17, 19, 23-26, 29-30, 34-36.)

The Supreme Court in *Armstrong v. Manzo* (1965) 380 U.S. 545, 552 stated the fundamental requisite of due process of law is the opportunity to be heard. "It is the opportunity which must must be granted, at a meaningful time and in a meaningful manner".

A deprivation of Plaintiffs' due process rights manifest the inability of Judge Lewis to be fair and impartial, therefore this judge should recuse herself.

In *Fuentes, supra,* at page 81, the Court states

> [t]he requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself to protect arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interest can be prevented. It has long been recognized that **fairness can**

> **rarely be obtained by secret, one-sided determination of facts decisive of rights** . . . . (Emphasis added.)

6. **Judge Joan Lewis should recuse herself because this case was dismissed and Judge Lewis refused to perform the ministerial duty of filing or requesting the clerk to enter a judgment; there is a clear inference of partiality in favor of Defendants, especially since Judge Lewis ignores Plaintiffs' pleadings the law established in their request for entry of judgment.**

The record reflects Judge Lewis' intent to treat her oral orders such as the dismissal as an appealable final order. (Abrahams' Decl., ¶¶1-5, 21-24, 34.a.)

The defendant requested a dismissal of the entire case and the Court, in clear language, granted the defendant's request, after the defendant announced he accepted the tentative decision and after the Court dismissed the order. (Abrahams' Dec., ¶¶ 35.i., 36-49.) Judge Lewis entered into an ex parte discussion with Mr. Berg after Mr. Abrahams was escorted out of the courtroom by the bailiff. (Abrahams' Decl. ¶¶ 40-48.)

The defendant's counsel, Mr. Berg, asked the Court to modify her order after accepting the tentative decision and asked for a dismissal to the first cause of

action when Judge Lewis overruled his objection that Mr. Abrahams violated a court order by adding a new cause of action. (Abrahams' Decl. ¶¶5.e., 27, 42-49.) Judge Lewis is trying to please the defendant by allowing defendant Jacob Health Care Center to file another demurrer after dismissing the case and overruling defendant's demurer. (Abrahams' Decl. ¶¶ 15, 23-30, 36, 42-49.)

When there is a dismissal, Rule 391 of the California Rules of Court makes it mandatory for the prevailing party to file the order for the Trial Court's Judge's signature. Judge Lewis did not deem an Entry of Judgment necessary, and this should have been done to avoid any further appearance of partiality. (Abrahams' Decl., ¶¶ 1-5.)

When a judge has announced an intent to dismiss and does dismiss the case and then schedules later hearings, an objective observer would doubt that Judge Lewis can be impartial.

This Judge showed partiality by not entering a judgment after plaintiffs established Judge Lewis has the ministerial duty to enter a judgment. The judge further

refused to enter any judgment because she, through her clerk, called Mr. Abrahams by telephone so that Mr. Abrahams could request an ex parte hearing. (Abrahams' Decl., ¶¶36 –47.)

Partiality towards Defendant is obvious when well-established rules are violated to favor a party.

Judge Lewis has not been performing her judicial function and her extra judicial decisions because they are not founded on statute or legal authorities are disqualifying.

Judge Lewis has failed to recognize her role in our adversary system. This is one case where a judge's rulings are per se disqualifying as the judge rulings were one sided because pleadings of the defendants were the only ones considered. *Liteky v. U.S.* (1994) 510 U.S. 540, 555.

Any real chance of succeeding on the merits of the plaintiffs' opposition to the motion and demurrers is lost "when the Court decides on an ex parte examination of the record". *Douglas v. California* (1962) 372 U.S. 353, 356.

There can be no question that laws must be applied equally. The U.S. Supreme Court in *United States v.*

Chronic (1984) 466 U.S. 648,655 stressed the importance of equal application to all litigants of the adversary system. "[A]n adversarial trial promotes decisions that are well grounded in both the law and the facts because each side will with partisan's zeal, bring to the court's attention all the favorable to that side".

Judge Joan Lewis should recuse herself because the public cannot have faith in our judicial system when a judge gives the appearance of partiality by considering one side only and thereby effectively engaging in a prohibited ex parte communication by considering arguments of one side only.

The requirements for disqualification is "fundamentally an objective one". In *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, the court stated:

> The new statute altered the requirement by making the disqualification standard "fundamentally an objective one". It represents a legislative judgment that due to the question and the inherent difficulties of proof as well as the importance of public confidence in the judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable man [or woman] would entertain doubts concerning the judge's

> impartiality, disqualification is mandated. "To ensure that the proceedings appear to the public to be impartial and hence worthy of their confidence, the situation must be viewed through the eyes of the objective person. [Citation.]" (*In re Marriage of Iverson, supra*, 11 Cal.App.4th at p. 1505 (conc. opn. of Moore, J.) quoting *United Farm Workers of a America v. Superior Court* (1985) 170 Cal.App.3d 97, 104-105.

The reason for the objective test is the difficulty in showing a judge is biased unless the judge admits it.

When an average person knows the facts and would have doubts whether the judge can be impartial a judge should recuse himself. *Webber v. Webber* (1948) 33 Cal. 2d 153.

Legislation has been enacted because the poor and the elder need protection and the statutes were enacted to provide equality. The failure to apply rules of court demonstrates an invidious discrimination and an inference that can be drawn is Judge Lewis harbors a bias in favor of the rich and there is an appearance of partiality. *Griffin v. Illinois* (1955) 351 U.S. 12.

Equality is demanded by the 14th Amendment. *Douglas v. California, supra,* at pp. 355-358.

Judge Lewis has demonstrated her inability to exercise "discretion" because of her failure to acknowledge fixed legal principles.

> Discretion contemplated by law is not a capricious or arbitrary one, but an impartial discretion guided in its exercise by fixed legal principles. The spirit of the law and in a manner to subserve and not impede or defeat the ends of substantial justice. *Kalmus v Kalmus* (1951) 103 Cal.App.2d 405.

The California Supreme Court had removed Judge Cannon for "bad faith" in her faithful discharge of judicial duties. *Cannon v. Commissioner on Judicial Qualification* (1975) 14 Cal.3d 678, 695.

> The term " bad faith" implies that the judge intentionally committed acts which he knew or should have known were beyond his lawful power. The Supreme Court went on to state that "bad faith" encompasses acts within the lawful power of a judge which they are never committed for corrupt purposes, i.e., for any purpose other than the faithful discharge of judicial duties.

7. <u>An appealable order once rendered cannot be changed or modified and this Judge's refusal to Enter the Judgment shows a partiality towards the Defendants and reason for disqualification</u>.

It is well-established one looks to the effect of an order to determine its appealability. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695. The legal effect of the order of dismissal was an appealable judgment. The Supreme Court in *Daar* stated:

> This court has observed that it "has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectively as would any formal judgment." *Id.*at p. 699.

Once a judgment is rendered it cannot be modified by a minute order. The Court can only change an order to make the record speak the truth. Courts can only correct an order because of a clerical error, not a judicial error. *Olivera v. Grace* (1942) 19 Cal.2d 570.

The Clerk cannot alter the judgment, as his task is ministerial. The judgment must be entered as rendered. *Lane v. Pellissier* (1929) 208 Cal. 590.

A judgment is appealable when no further judicial action is necessary. *UAP-Columbus JV 326132 v. Nesbitt*

(1991) 234 Cal.App.3d 1028, 1034. An order, which is a final determination of the rights of the parties, is the "judgment." *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602.

Once there is a judgment, the clerk performs a ministerial duty by reflecting the final order in the minutes and enters a judgment. *Yancey v. Fink* (1991) 226 Cal.App.3d 1334. Neither the clerk nor the judge can enlarge or modify the judgment. *McMahon v. Hetchy-hetchy Etc. Ry. Co.* (1905) 2 Cal.App. 402 .

Judge Lewis did not comply with plaintiffs' request by having her clerk telephone Mr. Abrahams because the clerk stated there need be a hearing. (Abrahams' Decl., ¶¶25, 50-53.)

The plaintiffs requested a ministerial act on the part of Judge Lewis, and plaintiffs, in their request, provided established authorities for an entry of judgment without the need for a hearing. Judge Lewis cannot impose conditions and require plaintiffs to notice defendant's counsel so that he can attend a hearing when the ex parte request does not require any discretion on the part of the

Judge. (Abrahams' Decl., ¶¶25, 50-53.) The Judge's imposition of this condition reflects a partiality because the Judge is looking to defendant to justify a modification of a final order. (Abrahams' Decl., ¶53.)

An order of dismissal is to be treated as a judgment for purposes of an appeal when it finally disposes of the action and prevents further proceedings as effectively as would a former judgment. *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 304.

When there is an unwarranted refusal of the Clerk to act by making a minute entry to conform to the actual order, or an unauthorized order of the Judge staying the entry, mandamus will lie to compel the entry. *Woods v. Rechenmacher* (1942) 53 Cal.App.2d 294; *California Assn. of Psychology Providers v. Rank*, (1990) 51 Cal. 3d 1, 3.

"All dismissals ordered by the court...shall constitute judgments and be effective for all purposes." *D'Hondt v. Regents of University of California*, (1984) 153 Cal. App. 3d 723. (Abrahams's declaration, paragraphs 1-7, 11, 14-16, 19-21, 24-29, 32-34, 39-43).

Judge Lewis indicated that the sole issue before her on April 23, 2004 was whether the case should be dismissed for failure to file an amended complaint. Abrahams' Declaration, paragraph 37.

The Court clearly dismissed the case by stating, "Your motion to dismiss is granted. The case is dismissed." (Abrahams' Decl., 37.)

The record evidences an ex parte discussion following Mr. Abrahams ejection from the court room and this inference is obvious because the minute order modified the final order of the Court, when such modification was never mentioned at the hearing. The desire to continue this case because Defendant indicated that he wanted to file a substantive demurrer is evidence of a bias although bias is irrelevant. Appearance of partiality is the real test or standard to be used by Judge Lewis when deciding whether to disqualify herself.

Whether Judge Lewis believes she is in good faith or unbiased is irrelevant.

WHEREFORE, it is respectfully requested that

1. Judge Joan M. Lewis recuse herself

because there is an appearance of partiality and doubts as to her ability to be impartial as it is reflected by the record.

DATED: September 11, 2004

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Charles L. Abrahams

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 1891 Titus Street, San Diego, CA 92110. In the ordinary course of business, correspondence is deposited with the United States Postal Service that same day.

On April 28, 2007 I served three copies (3) of the within document(s) described as: CORRECTED PETITION FOR WRIT OF CERTIORARI; APPENDIX TO PETITION FOR WRITE OF CERTIORARI by U.S. MAIL to the following:

Randy Berg, Esq.
Gittler & Bradford
10537 Santa Monica Blvd., Third Floor
Los Angeles, CA 90025-4952
Fax: 310 474 4407
Tel: 310 474 4007

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct.

Executed on April 28,2007, at San Diego, California.

Yolanda Balderacchi